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No. 91-594

In the Supreme Court of the United States

OCTOBER TERM, 1991

AMERICAN NATIONAL RED CROSS, PETITIONER

v.

S.G. AND A.E., RESPONDENTS

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

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REPLY BRIEF FOR THE PETITIONER

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In our petition, we demonstrated that the courts of appeals and the district courts are deeply divided over whether the sue-and-be-sued clause in the Red Cross charter confers federal jurisdiction over actions involving the Red Cross. The petition demonstrated that the division has continued to deepen, contrary to respondents' unfounded supposition (Br. in Opp. 7) that the decision below could somehow promote uniformity. Finally, we also explained that the decision below cannot be reconciled with *Osborn* v. *Bank of the United States*, 22 U.S. (9 Wheat.) 738 (1824), and its progeny, and that it threatens to undermine established law concerning jurisdiction over federal agencies and instrumentalities other than the Red Cross.

Respondents concede that the lower federal courts are in complete disarray with respect to the jurisdic-

tional issue raised in the petition; nevertheless, they offer a laundry list of arguments to dissuade this Court from resolving the issue. All of those arguments are misguided.

1. Respondents begin by asserting (Br. in Opp. 3-7) that, because of 28 U.S.C. § 1447(d), this Court lacks jurisdiction. If respondents mean to suggest that Section 1447(d) generally precludes Supreme Court review of decisions of the courts of appeals directing remands to state courts, their position is contrary to hornbook law: "if * * * the court of appeals holds that the case was not properly removed, and orders remand, this order is not within the statutory ban on review * * * and may be considered by the Supreme Court." 14A C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 3740, at 598 (1985); see also 1A J. Moore & B. Ringle, *Moore's Federal Practice* ¶ 0.169[2.-1], at 697 (1990) (Section 1447(d) applies only to remand order by the district court and "d[oes] not preclude review by the Supreme Court of an order to remand made by the court of appeals"); *Chicago, Burlington & Quincy Railway* v. *Willard*, 220 U.S. 413 (1911) (reviewing appellate court's remand order).

If respondents are suggesting more narrowly that the district court's remand order in this case, entered after the court of appeals ruled, strips this Court of jurisdiction, then they are also wrong. In making that argument, respondents have chosen to ignore *Aetna Casualty & Surety Co.* v. *Flowers*, 330 U.S. 464, 466-467 (1947), where a unanimous Court rejected the identical contention that a remand to the state court defeated this Court's jurisdiction.[1] Citing

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[1] Respondents accuse the Red Cross of "evasive maneuvering" (Br. in Opp. 5) and suggest that the case must be

the predecessor to Section 1447(d), the Court wrote that "no such limitation affects our authority to review an action of the Circuit Court of Appeals, directing a remand to state court." *Id.* at 467. And, although the mandate of the court of appeals had issued and the district court had remanded the case (*id.* at 466), that fact could not "defeat this Court's jurisdiction" (*id.* at 467). Jurisdiction in the present case is controlled by *Aetna*.[2]

A district court's remand order does not moot the issue whether remand is proper. The FDIC, for example, is statutorily authorized to appeal "any order of remand entered by any United States district court" (12 U.S.C. § 1819(b)(2)(C)), and the courts have applied that provision without any hesitancy over the existence of an Article III case or controversy. *E.g.*, *NCNB Texas National Bank* v. *Fennell*, 942 F.2d 934 (5th Cir. 1991). Similarly, there is

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deemed unreviewable because the Red Cross previously suggested that it might be. Whether the case is reviewable here is a question of law, however, and that question is controlled by *Aetna*. Precisely so that respondents would be aware of *Aetna* and would not mistakenly assert that the Red Cross concedes the unreviewability of this case, petitioner's counsel alerted respondents to *Aetna* by letter at the time the petition for certiorari was filed. See Appendix, *infra*. Respondents nevertheless have failed to address, much less attempt to distinguish, that controlling case in their brief in opposition.

[2] See also *Gay* v. *Ruff*, 292 U.S. 25, 29-31 (1934) (certiorari jurisdiction unaffected by circuit court's order to remand case to state court); cf. *United States* v. *Villamonte-Marquez*, 462 U.S. 579, 581 n.2 (1983) (citing *Aetna*) (jurisdiction not defeated by failure to obtain a stay of circuit court mandate); *Graddick* v. *Newman*, 453 U.S. 928, 945 n.1 (1981) (opinion of Rehnquist, J.) (citing *Aetna*) (issuance of mandate does not bar appellate review); *Carr* v. *Zaja*, 283 U.S. 52, 53 (1931) (same).

no jurisdictional obstacle to review of this case in this Court.

2. Respondents next contend (Br. in Opp. 6-7) that there is insufficient conflict among the lower federal courts to justify granting certiorari in this case. Respondents concede, however, as they must, that more than 40 courts have interpreted 36 U.S.C. § 2, and that roughly half conclude that it creates federal jurisdiction while the others conclude that it does not. In fact, the issue in this case has divided not only the courts of appeals, but also the district courts and indeed individual judicial districts. See Pet. 10-12. There is no reason to believe that the lower courts will somehow harmonize their views of 36 U.S.C. § 2 without help from this Court, nor is it plausible to credit respondents' speculative hope (Br. in Opp. 7) that the decision below could promote uniformity among the courts. To the contrary, the decision below exacerbated the existing divisions by creating a square circuit split. Moreover, district courts have continued to interpret the Red Cross charter in contradictory ways even after the First Circuit's ruling. See Pet. 10-11 nn.4 & 5 (citing 6 cases, divided 4-2, after the decision below); see also *Faust* v. *Red Cross*, No. C 91-20379 (N.D. Cal. Oct. 3, 1991) (resolving issue against Red Cross); *Jones* v. *American Red Cross*, Civ. No. 91-686MA (D. Or. Sept. 24, 1991) (same). The problem is a recurring one that cries out for resolution through certiorari.

The district and appellate courts have ventilated the present issue thoroughly, but they have come to an impasse. And, as we explained in the petition, there are systemic reasons that inhibit appellate review of the jurisdictional issue. Pet. 12-13. The

present case affords this Court a rare opportunity to resolve this important issue.

3. Respondents' argument that this Court should decline to exercise jurisdiction solely because of the interlocutory nature of the appeal (Br. in Opp. 8-9) is equally misguided. The Court regularly grants review in civil cases that are in an interlocutory posture when the question presented is jurisdictional. See, *e.g.*, *FSLIC* v. *Ticktin*, 490 U.S. 82 (1989); *Bowen* v. *Massachusetts*, 487 U.S. 879 (1988); *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949); *Land* v. *Dollar*, 330 U.S. 731 (1947). Indeed, it would be wasteful in the extreme to require parties to litigate a claim to a final judgment if the entire trial could be nullified for lack of jurisdiction.

The reason this Court sometimes declines to review cases in an interlocutory posture is that it will have the opportunity to review those same issues, and any others that may subsequently arise, on review of a later final judgment. See R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice* 224 n.71 (6th ed. 1986). That rationale has absolutely no application to this case, however. Any final judgment ultimately entered in this case, unless this Court grants certiorari now, will be rendered by a *state* court, and this Court would have no authority to address the issue of federal jurisdiction on a petition for a writ of certiorari to review the judgment of that court. 1A J. Moore & B. Ringle, *supra*, ¶ 0.169[2.-1], at 696 & n.41; *Metropolitan Casualty Insurance Co.* v. *Stevens*, 312 U.S. 563, 568 (1941); *Missouri Pacific Railway* v. *Fitzgerald*, 160 U.S. 556, 582 (1896). In this case, unlike other "interlocutory" cases, review must take place now or never.

Respondents also complain (Br. in Opp. 5, 8-9) that the Red Cross is somehow to blame for delaying the resolution of this case by litigating the jurisdictional issue. That argument is misleading and unfair. If respondents genuinely were eager to litigate the case on the merits without regard to the correct resolution of the jurisdictional issue, they could have simply litigated it in federal court instead of moving to remand to state court, and they could have forgone an appeal once the district court ruled against them. Having twice introduced delay into the proceeding by moving to remand and by appealing, respondents are in no position to complain that the Red Cross is exercising its right to press on for resolution of the issue.

Furthermore, although we sympathize with the plight of respondent S.G., the argument that she is suffering from AIDS during the pendency of the case ultimately bolsters rather than undercuts the Red Cross's position that certiorari should be granted. Uncertainty over whether the Red Cross charter creates federal jurisdiction has spawned litigation that has stalled dozens of cases involving claims that the plaintiffs contracted HIV or AIDS as a result of blood transfusions. Prompt, definitive resolution of the jurisdictional dispute would benefit all such claimants, as well as the Red Cross.

4. Respondents' argument that certiorari should be denied because the basis for federal jurisdiction does not appear on the face of the complaint (Br. in Opp. 10-11) is frivolous. (In any event, respondents' argument, even if it had substance, would go to the merits of the question presented and not its cert-worthiness.) The "well-pleaded complaint" doctrine is an interpretation of 28 U.S.C. § 1331 ("arising under" jurisdiction) and has no relevance to cases in

which federal jurisdiction is conferred by a different statute such as 36 U.S.C. § 2. This is not a case where the defendant seeks federal jurisdiction pursuant to an affirmative defense or a claim of immunity; rather, the Red Cross's right to a federal forum is based on its *status*, which is implicated whenever suit is brought against it. The Red Cross is entitled to litigate in federal court whether the claims raised by respondents are based on state or federal law.

5. Respondents next suggest (Br. in Opp. 12-13) that the jurisdictional issue presented in this case is not important enough to warrant a grant of certiorari and that the issue is of purely "academic" interest. Both of these contentions are meritless. In the petition (at 23-27) we explained the many reasons why the present issue is important, so it is unnecessary to recapitulate them here. And surely the issue is more than "academic"; scores of litigants are devoting resources to contesting the issue, and cases are being remanded to state court or are proceeding in federal court on the basis of the conflicting decisions. Respondents' contention that review by this Court would not promote uniformity is similarly misconceived. Obviously the resolution of a *jurisdictional* issue will not yield uniform substantive results, because the underlying facts and legal theories will differ in each case. But it is still important that the jurisdictional issue itself be resolved uniformly among federal courts.

Respondents also misunderstand (Br. in Opp. 14) our references to the charter provisions of other federal agencies. Respondents contend that jurisdiction over actions against the federal agencies mentioned in the petition (at 13-14, 26) is provided by 28 U.S.C.

§§ 1345 and 1349, not by the sue-and-be-sued clauses of those agencies. Br. in Opp. 14. But Section 1345, entitled "United States as plaintiff," applies only to actions brought *by* the United States and its agencies, not actions *against* them. Cf. *Northbrook National Insurance Co.* v. *Brewer*, 493 U.S. 6, 7 (1989). It is the ability of those agencies *as defendants* to remove actions from state to federal court that is of concern here and is threatened by the decision below. Section 1349 is an arguable grant of jurisdiction only over actions against corporations with "capital stock" that is owned by the United States; it does not apply to agencies, such as HUD, the PBGC, and GNMA, that lack capital stock. Neither Section 1345 nor Section 1349 can substitute for proper interpretation of the charter provisions of federal agencies and instrumentalities.

6. Respondents' final contention (Br. in Opp. 15-18) is that certiorari should be denied because the decision below is correct. Yet respondents offer nothing more than a rehash of the First Circuit's reasoning, ignoring the demonstration in our petition that the First Circuit erred in several respects. The arguments made in the petition stand unrebutted.[3]

The question whether the Red Cross charter confers federal jurisdiction over actions involving the Red Cross has generated stark conflict among the

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[3] Furthermore, even if respondents were right, in light of the division of authority in the lower courts the correct course would be for this Court to grant certiorari and affirm, not to deny certiorari; for the implication of respondents' position is that every federal court that is allowing a Red Cross case to proceed is doing so without jurisdiction, and the maximum possible waste of judicial resources is occurring and will continue until this Court resolves the issue.

lower federal courts and has tied up the resources of litigants and the courts in procedural disputes. The present case affords an excellent opportunity to resolve this issue and forestall still further waste.

For the foregoing reasons and those given in the petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted.

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NOVEMBER 1991

APPENDIX A

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October 1, 1991

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Re: *Red Cross* v. *S.G. and A.E.*

Dear Messrs. Richardson and Upton:

I enclose three service copies of the petition for a writ of certiorari filed today in the above-captioned case.

In our stay application filed with Justice Souter yesterday, we suggested that this case might become moot if the Supreme Court did not grant a stay and the case was remanded to state court. Subsequent research has disclosed that the Supreme Court retains jurisdiction to review a court of appeals' judgment directing a remand to state court, even if the district court has already remanded the case. *Aetna Casualty & Surety Co.* v. *Flowers*, 330 U.S. 464, 466-467 (1947). Accordingly, we believe that this case is not moot, and we will continue to pursue review in the Supreme Court.

Sincerely,

/s/ Roy T. Englert, Jr.
ROY T. ENGLERT, JR.

Enclosures